

Best Practices for Agency FOIA Regulations

- Let the Freedom of Information Act itself be your guide. Many of the public comments OGIS submits pertaining to FOIA regulations relate directly to requirements of the FOIA amendments of 2007 (and sometimes the e-FOIA amendments of 1996). For example, OGIS frequently recommends that agencies specifically address the new requirements in 5 U.S.C. § 552 (b) that agencies shall (1) indicate, if technically feasible, the precise amount of information deleted and the exemption under which the deletion is made at the place in the record where the deletion is made, and (2) indicate the exemption under which a deletion is made on the released portion of the record, unless including that indication would harm an interest protected by the exemption.
- Tackle any updates or complete revisions of FOIA regulations as a team. Bring attorneys, FOIA processors, records managers and IT professionals to the table. Each will bring a different perspective — plus, a well-organized team can lighten the load for a single person on a tedious but important task.
- Don't forget plain writing. Although the Plain Writing Act of 2010 does not cover regulations, two executive Orders emphasize the need for plain language: E.O. 12866 says that regulations must be “simple and easy to understand, with the goal of minimizing uncertainty and litigation...” and E.O. 12988 says that each agency must specify its effect “in plain language.” Remember, FOIA regulations endure and are there for both agency FOIA professionals and the public.
- Many requesters confuse FOIA and Privacy Act requests. Consider trying to clarify by using the following language: The Freedom of Information Act applies to third-party requests for documents concerning the general activities of the government and of the agency in particular. The Privacy Act of 1974 covers records maintained by the agency under the individual's name or personal identifier. When a U.S. citizen or an individual lawfully admitted for permanent residence requests access to his or her own records, it is considered a Privacy Act request. Although requests are considered either FOIA requests or Privacy Act requests, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access while safeguarding an individual's personal privacy.



- If your regulation includes a glossary, consider adding several terms, including requester category and fee waiver. OGIS has found that even experienced requesters can still confuse those terms. We also suggest including in a glossary FOIA Public Liaison, the definition of which is at 5 U.S.C. § 552 (l). We suggest including it to reflect the position's statutorily enhanced role in the 2007 FOIA amendments. Check out the OGIS Library at <https://ogis.archives.gov/the-ogis-library.htm> for definitions of FOIA terms.
- With regard to referrals, OGIS suggests that the referring agency notify requesters of the name of the agency to which the request has been referred and the part of the request that has been referred. OGIS suggests that the agency also provide the requester with a point of contact within the receiving agency to whom the requester can speak regarding the referral. This is an OGIS recommendation (<http://blogs.archives.gov/foiablog/2011/05/11/ogistance-what%e2%80%99s-up-with-referrals-these-days/>) and reflects guidance issued by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapost/2011foiapost42.html>).
- OGIS suggests that agencies provide requesters with an estimated amount of fees, including a breakdown of fees for search, review or duplication. Regulations may also provide for an agency to exercise administrative discretion to waive fees in the interest of better serving FOIA and making government more efficient. OGIS has seen fee disputes that have consumed agency resources that in the end were not worth fighting, serving only to waste agency resources and delay release of requested documents.
- OGIS suggests agencies include in their FOIA regulations information about the preservation of records and records management. OGIS has observed that good records management is essential to the FOIA administrative process. One Cabinet-level department FOIA regulation spells out that each component must preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the agency's General Records Schedule of the National Archives and Records Administration (NARA) or other NARA-approved records schedule. The regulation also states that materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or

lawsuit is pending. This policy applies even if the records would otherwise be authorized for disposition or destruction under the agency's General Records Schedule or other NARA-approved records schedule.

- OGIS suggests agencies include in their regulations that they will work with the Office of Government Information Services (OGIS) to resolve disputes between FOIA requesters and the agency in accordance with FOIA and any agency policy memoranda. Also, that the agency, in its final appeal determinations, will alert FOIA requesters to OGIS's services, as recommended by the Department of Justice's Office of Information Policy (<http://www.justice.gov/oip/foiapost/2010foiapost21.htm>). In addition, OGIS recommends that agencies add language, in accordance with the 2007 amendments to FOIA (5 U.S.C. § 552 (h)), that direct agencies and their components to work with OGIS to resolve disputes between FOIA requesters and the agency as a non-exclusive alternative to litigation.

Specifically, OGIS suggests the following language:

A response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. A requester may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.nara.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

- At an impasse on updating your FOIA regulations? Need feedback? Call OGIS. We're here to help.